

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave, Ste 312
Leesburg, VA 20176

Plaintiff,

vs.

ENVIRONMENTAL PROTECTION AGENCY
1301 Constitution Ave, NW
Washington, DC 20004

Defendant.

Case No. _____

COMPLAINT
(COMPLAINT FOR DECLARATORY RELIEF)

Plaintiff Landmark Legal Foundation (“Landmark”), by and through undersigned counsel, brings this action against the U.S. Environmental Protection Agency (“EPA”) under the Freedom of Information Act (“FOIA”), 5 U.S.C § 552 *et seq.*, seeking declaratory and other relief to enjoin the EPA to expeditiously produce requested documents.

JURISDICTION AND VENUE

1. Jurisdiction is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
2. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff Landmark Legal Foundation is a nonprofit organization created under the laws of Missouri with offices in Leesburg, Virginia and Kansas City, Missouri.

4. Landmark is a national public interest law firm committed to preserving the principles of limited and ethical government, separation of powers, federalism, strict construction of the Constitution and individual rights. Among Landmark's primary activities is the dissemination of information to the public about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards.

5. Defendant EPA is a federal agency of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). EPA's headquarters are located at 1301 Constitution Ave, NW, Washington, DC.

LANDMARK'S FOIA REQUEST

6. In July 2012, major media outlets published news reports indicating that the EPA is intentionally delaying the issuance of controversial new regulations until after the November election. (Exhibit 1, Landmark FOIA Request, attached hereto and incorporated herein by reference, at Exhibit A.)

7. Reports also indicate that the Obama Administration "is seeking to issue regulations before the Nov. 6 elections that may bolster its messaging." (Id.)

8. Additional public reports indicate that some political observers "see a crass political calculation at play: Don't give Romney any more ammunition before the election - and then open the floodgates after the polls close." (Exhibit 1, Landmark FOIA Request at Exhibit D.)

9. Taken together, these news stories suggest several troubling possibilities, including: a) the Obama Administration is improperly politicizing EPA activities; b) EPA officials are attempting to

shield their true policy goals from the public; and/or c) EPA officials themselves are putting partisan interests above the public welfare.

10. Accordingly, on August 17, 2012, plaintiff requested records relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012, not including public comments or other records available on the rulemaking docket.

11. Plaintiff filed the Request with defendant EPA's National Freedom of Information Officer, located at EPA headquarters.

12. Plaintiff sought a waiver of search, review, and reproduction fees pursuant to the FOIA and EPA regulations. Plaintiff also requested and is entitled to expedited processing of its request because it is an entity "primarily engaged in disseminating information" and has an "urgency to inform the public concerning actual or alleged Federal Government activity" under 5 U.S.C. § Section 552(a)(6)(E)(v); 40 CFR 2.104(e)(1)(ii) and 40 CFR 2.104(e)(3). (Exhibit 1.)

13. By letter dated August 29, 2012, the EPA acknowledged receipt of the Request and assigned it tracking number HQ-FOI-01861-12. The letter granted Landmark's fee waiver request but denied expedited processing because Landmark had "not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." EPA failed to address Landmark's asserted basis for expedited processing. (Exhibit 2, EPA letter dated August 29, 2012, attached hereto and incorporated herein by reference.)

14. On September 14, 2012, Landmark submitted an administrative Appeal of the EPA's decision to deny expedited processing, demonstrating that EPA applied the incorrect standard to its expedited processing denial. (Exhibit 3, Landmark's September 14, 2012 Administrative Appeal, attached hereto and incorporated herein by reference.)

15. On October 22, 2012, Plaintiff received EPA's denial of Landmark's administrative appeal. (Exhibit 4, EPA's October 18, 2012 letter denying Landmark's administrative appeal, attached hereto and incorporated herein by reference.)

16. Although the Request has been pending for more than 65 days, the defendant in this suit has not produced any responsive records. Furthermore, Defendant has not provided any basis for withholding responsive records.

17. Landmark has exhausted all administrative remedies provided by statute.

18. In a related case,¹ Defendant was held in contempt for violating a court order and statutory mandates. EPA had erased computer hard drives and email backup tapes containing potentially responsive material despite 1) the Court's preliminary injunction directing EPA to preserve records; 2) the FOIA's clear requirements and 3) EPA's repeated assurances that it was fully compliant with the law. *See Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp. 2d 70, 74 (D.D.C. 2003). Upon information and belief, Plaintiff is concerned that the records requested in the instant FOIA request may likewise not be adequately protected from destruction or concealment.

CAUSES OF ACTION

19. Defendant's failure to promptly make available the records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and defendant's corresponding regulations.

20. Defendant's failure to grant plaintiff's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E) and 40 CFR 2.104(e).

¹ Plaintiff has submitted to the Clerk a Related Case form noting that this matter is related to *Landmark Legal Foundation v. Environmental Protection Agency*, D.C.C. Case No. 00-2238 (RCL).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter an immediate order directing EPA to preserve all records potentially responsive to Plaintiff's FOIA request and prohibiting EPA, its employees, agents or representatives from transporting, concealing, removing, destroying or in any way tampering with records potentially responsive to Plaintiff's FOIA request;
2. Enter an order declaring that the EPA:
 - a. has wrongfully denied Landmark's request for expedited processing;
 - b. must immediately conduct an expedited search for responsive records; and
 - c. must process and produce immediately all records responsive to the Request;
3. Enter an order declaring that Plaintiff Landmark Legal Foundation qualifies as an entity "primarily engaged in disseminating information" for purposes of expedited processing under the FOIA; and
4. Award Plaintiff's costs and reasonable attorneys' fees incurred in this action; and
5. Grant such other relief as the Court may deem just and proper.

DATED: October 22, 2012

Respectfully Submitted,

s/ Michael J. O'Neill
Michael J. O'Neill #478669
Landmark Legal Foundation
19415 Deerfield Ave
Suite 312
Leesburg, VA 20176
703-554-6100
703-554-6119 (facsimile)
mike@landmarklegal.org

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/ Malpractice <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security</u> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
<input type="radio"/> E. General Civil (Other) OR <input type="radio"/> F. Pro Se General Civil			
<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/ Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)


<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
☒ 1 Original Proceeding ☐ 2 Remand from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multi-district Litigation ☐ 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
EPA'S FAILURE TO ADHERE TO OBLIGATIONS UNDER FREEDOM OF INFORMATION ACT (5 U.S.C. 552 et. seq.).

VII. REQUESTED IN COMPLAINT	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ 0	JURY DEMAND:	Check YES only if demanded in complaint YES <input type="checkbox"/> NO <input type="checkbox"/>
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VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	If yes, please complete related case form
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DATE: 10-22-2012	SIGNATURE OF ATTORNEY OF RECORD 
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LANDMARK LEGAL FOUNDATION

Plaintiff

v.

ENVIRONMENTAL PROTECTION AGENCY

Defendant

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Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U.S. ATTORNEY GENERAL
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave., Suite 312
Leesburg, VA 20176

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LANDMARK LEGAL FOUNDATION

Plaintiff

v.

ENVIRONMENTAL PROTECTION AGENCY

Defendant

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Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Ave., NW
Washington, DC 20460

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave., Suite 312
Leesburg, VA 20176

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LANDMARK LEGAL FOUNDATION

Plaintiff

v.

ENVIRONMENTAL PROTECTION AGENCY

Defendant

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Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA
555 4th Street NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave., Suite 312
Leesburg, VA 20176

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk



August 17, 2012

Via Express Mail and Electronic Mail

National Freedom of Information Officer
U.S. Environmental Protection Agency
1301 Constitution Ave., NW
Room 6416 West
Washington, DC 20004
hq.foia@epa.gov

Re: Proposed Rules, Summer/Fall 2012

To Whom It May Concern:

This is a Freedom of Information Act Request pursuant to 5 U.S.C. Section 552 *et seq.* relating to published reports that the Environmental Protection Agency ("EPA") is intentionally delaying the issuance of controversial new regulations until after the November elections. Reports also indicate that the Obama Administration "is seeking to issue regulations before the Nov. 8 elections that may bolster its messaging." (Exhibit A, "EPA Positioned To Stay Under Radar Through 2012 Election Season," InsideEPA.com, July 17, 2012, available at <http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/insider-special-July-17-2012/menu-id-565.html>) The charges have come from multiple sources and suggest several troubling possibilities: the Obama Administration is improperly politicizing EPA activities, EPA officials are attempting to shield their true policy goals from the public, and/or EPA officials themselves are putting partisan interests above the public welfare.

For example, the Bozeman Daily Chronicle reports that "a growing number of regulations are being delayed at federal agencies or at the White House" including EPA regulations. (Exhibit B, "As the Election Nears, New Regs Facing Delays," Bozeman Daily Chronicle, July 31, 2012, p. A4.) Politico.com reports that, "Even some Democrats say the White House has responded to political reality in slowing down environmental regulations." In fact, more EPA-generated rules were held up in the review stage of the White House's Office of Information and Regulatory Affairs (OIRA) than any other department or agency. (Exhibit C, Jonathan Allen and Erica Martinson, "EPA Wears the Bulls-Eye," Politico.com, June 20, 2012, available at <http://www.politico.com/news/stories/0612/77626.html>) Politico.com also writes that "Some say [Obama] truly believes in regulatory restraint during tough economic times. Others see a crass political calculation at play: Don't give Romney any more ammunition before the election - and then open the floodgates after the polls close." (Exhibit D, Darren Samuelsohn

Headquarters: 3100 Broadway • Suite 1210 • Kansas City, Missouri 64111 • (816) 931-5559 • FAX (816) 931-1115
Virginia Office: 19415 Deerfield Avenue • Suite 312 • Leesburg, Virginia 20176 • (703) 554-6100 • FAX (703) 554-6119

and Jonathan Allen, "President Obama's Administration Slow-walks New Rules, Politico.com, July 12, 2012, available at <http://www.politico.com/news/stories/0712/78419.html>)

Accordingly, this FOIA request seeks information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and the date of this request.

Given the timeliness of this matter and the public interest in the unprecedented privacy concerns raised, Landmark Legal Foundation ("Landmark") respectfully requests that this records request be given expedited processing. Moreover, as Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program, Landmark requests the waiver of all fees and costs associated with this request.

I. Records Requested

Landmark seeks disclosure of the following records¹ **from January 1, 2012 to August 17, 2012** relating to:

1. Any and all records identifying the names of individuals, groups and/or organizations outside the EPA with which the EPA, EPA employees, EPA contractors and/or EPA consultants have had communications of any kind relating to all proposed rules or regulations that have not been finalized by the EPA between January 1, 2012 and August 17, 2012. For the purposes of this request, "communications of any kind" does not include public comments or other records available on the rulemaking docket.
2. Any and all records indicating an order, direction or suggestion that the issuance of regulations, the announcements of regulations and/or public comment of regulations should be slowed or delayed until after November 2012 or the presidential elections of 2012.

II. Fee Waiver and Expedited Processing

Landmark seeks a fee waiver and expedited processing of this request.

A. Fee Waiver

Environmental Protection Agency ("EPA") regulations state:

Records responsive to a request will be furnished without charge or at a charge reduced below that established under [40 CFR 2.107(c)] when a FOI Office determines, based on all available information, that disclosure of the requested

¹ The term "records" as used herein includes all records or communications preserved in electronic, written, or printed form, included but not limited to correspondence, documents, data, photographs, video recordings in any format, audio recordings in any format, faxes, files, guidance, guidelines, evaluations, instructions, analyses, technical manuals, technical specifications, training manuals, or studies.

information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 40 CFR 2.107(l)(1) (2011).

EPA regulations further provide that four factors will be considered when determining whether a requester has satisfied the first requirement, i.e., whether the FOIA production is in the public interest.

- (i) Whether the subject of the requested records concerns “the operations or activities of the government”;
- (ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;
- (iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.”
- (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 40 CFR 2.107(l)(2)(i)-(iv) (2011).

EPA regulations further dictate that the Agency employ the following factors when determining whether a requester has satisfied the second requirement, i.e., whether the FOIA production is or is not in the requester’s commercial interest.

- (i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure;
- (ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, which disclosure is “primarily in the commercial interest of the requester.” A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Landmark satisfies each of these factors.

1. Release of Requested Records is in the Public Interest.

The FOIA requires the Agency to waive fees when disclosure of the requested record is in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii), Long v. BATF, 964 F. Supp.494, 498

(D.D.C. 1997). Further, “the amended statute ‘is to be liberally construed in favor of waivers for noncommercial requesters.’” McClellan Ecological Seepage Situation v. Carucci 835 F.2d 1282, 1284 (9th Cir. 1987), quoting 132 Cong. Rec. SS-14298 (Sept. 30, 1986) (statement of Sen. Leahy). Senator Leahy went on to explain that the 1986 amendment’s purpose was “to remove the roadblocks and technicalities which have been used by various federal agencies to deny waiver or reduction of fees under FOIA.” 132 Cong. Rec. S-16496 (Oct. 15, 1986).

As stated above, the EPA has set forth four factors to determine whether a release of requested records is in the public interest. Landmark satisfies each of these factors.

a. Whether the subject of the requested records concerns “the operation or activities of the government.”

Landmark seeks EPA records related to the EPA’s communications with external groups and individuals, including executive branch officials, over proposed rules or regulations. Proposing rules and regulations and the process leading up to such proposals are government activities. Clearly, the requested information concerns the operations or activities of the government.

b. Whether the disclosure is “likely to contribute to an understanding of government operation or activities.”

The disclosure of the EPA records sought will contribute to the public’s knowledge of EPA’s regulatory process. Although comments are sought from the public about new regulations, not all communications relating to the process are readily available to the public. The release of records showing communications between the EPA and outside groups and individuals, including executive branch officials, would help shed light on government activities that aren’t conducted in public view. This would undoubtedly contribute to an understanding of government operation or activities.

c. Whether the disclosure of the requested information will contribute to “public understanding.”

The disclosure of the requested information will contribute to the public understanding of the EPA operations as a result of Landmark’s long record of educating the public with information gathered through FOIA requests.

Upon receipt of this information, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information, thus ensuring that the information will contribute to the “public understanding” of the EPA’s conduct and operations:

1. Landmark will post responsive information on its web site (www.landmarklegal.org), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;

2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;
3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;
4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;
5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such numerous articles in the past;
6. Landmark will issue press releases to specific media outlets; and
7. Landmark staff will appear on television and radio programs.²

Landmark has a proven record of ensuring that information it receives pursuant to FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the Associated Press, The Wall Street Journal, The Washington Post, The Washington Times, and Fox News Channel.

d. Whether disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

The disclosure of EPA information, including documents, electronic mail, audits, reviews and reports, will contribute significantly to the public understanding of government operations or activities. The possibility that individuals within the EPA consider political ramifications during the rulemaking process and alter their schedule according to the electoral calendar would significantly contribute to the public understanding of government operations or activities. Indeed, if individuals within the EPA discuss these considerations with outside groups or receive instructions to alter their regulatory timetable, the general public would have great interest in such information and would have a significantly greater understanding of the EPA's true activities. Disclosure could demonstrate that the EPA is attempting to shield its true policy intentions from public view during the election season- the time when many Americans are most focused on policy issues such as environmental regulation. Disclosure of such records will allow Landmark to determine if the EPA seeks to protect the public wellbeing first and foremost.

Landmark clearly satisfies each of these four factors. Consequently, disclosure of the requested materials is in the public interest.

² See Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided “nine ways in which it communicates collected information to the public” sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

2. Disclosure of Requested Material is Not in Landmark's Commercial Interest.

In order for a fee waiver to be granted, the disclosure of the requested material must not be in the commercial interest of the requester. The EPA sets forth a two-part test in determining whether the requester has a commercial interest in the records release: (1) The Agency determines whether the requester has a commercial interest that would be furthered by the requested disclosure; (2) If the Agency determines the requester has a commercial interest, the Agency will engage in a balancing test to determine whether the identified commercial interest outweighs the public interest in disclosure. 40 CFR 2.107(l)(3)(i)-(ii) (2011).

Thus, in order to trigger the second part of the commercial interest test, a requester must have a commercial interest in the records release.

Landmark does not have any commercial interest in the release of the requested records. Obtaining, analyzing, and disseminating this information is consistent with Landmark's mission to educate the public concerning the activities of federal agencies. Landmark has no commercial interest of any kind, nor can it as a 501(c)(3) public interest non-profit organization. Since Landmark satisfies the first part of the commercial interest test, the balancing of the requester's commercial interest against the identified public interest is inapplicable.

B. Landmark's Request Should Receive Expedited Processing.

In order to receive expedited process, a FOIA request must show a "compelling need" by either: (1) establishing that the failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or (2) if you are a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public that actual or alleged Federal Government activity. 40 CFR 2.104 (e)(i)-(ii) (2011).

1. There is a Compelling Need For Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records related directly to several matters of tremendous public interest and debate as shown by the attached exhibits, including the delay of the rulemaking process because of an upcoming election. This delay raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's leadership is

intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. Each one of these issues is a matter for immediate and full disclosure.

There are many significant public interests implicated in the possibility that the EPA's activities have been politicized. The health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the EPA. Furthermore, these issues regarding EPA's regulatory activities (the EPA's fulfillment of its responsibilities to inform the public and submit to appropriate congressional oversight, and the possibility that the EPA has put partisan interests above the health and wellbeing of the general public) should be considered by the American public before voting in this year's presidential and congressional elections. In short, Landmark meets the factors for a compelling need.

2. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. As stated above, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

Moreover, Landmark's work is regularly reported on in national print, broadcast and electronic media outlets, including the *Washington Post*, *Washington Times*, *The New York Times*, *Wall Street Journal*, and many other national publications. Landmark's work is often discussed on national radio talk shows including *The Rush Limbaugh Show*, and *The Sean Hannity Show*. Landmark's president is a nationally syndicated talk show host, and while not in any way affiliated with Landmark, the Foundation's activities are regularly discussed on the program, which is heard by millions of Americans throughout the country. Landmark's only purpose in seeking this information, furthermore, is to disseminate such information to the public.

Landmark has thousands of supporters throughout the United States who are regularly informed through newsletters and other correspondence of the Foundation's activities. Landmark exists only through the donations received from the general public and does not accept any government funds. Accordingly, Landmark must disseminate information about its activities to the general public in order to function.

In Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that the group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

As noted on Landmark's website, "Among Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Agency conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark fully expects the EPA to fully comply with the legal mandates set forth in the FOIA.

Furthermore, please provide assurances that EPA officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request. Additionally, be aware that any actions taken in contravention of the Agency's responsibilities will be raised if this request becomes the subject of litigation.

III. Conclusion

If you intend to deny this request in whole or in part, Landmark requests that you provide specific and substantive justifications with full citation to applicable exemptions and supporting case law.

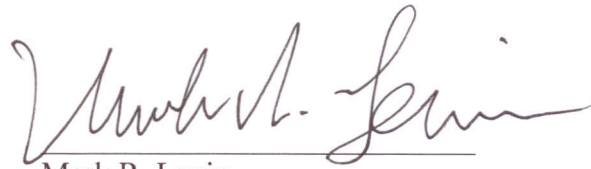
Please also note, while Landmark realizes that the EPA considers requests for fee waivers and expedited processing on a case-by-case basis, the EPA has granted Landmark's requests in the past. Moreover, Landmark has successfully litigated the issue of whether it qualifies for a fee waiver in federal court.

For the reasons stated above, Landmark asks that the EPA grant Landmark's fee waiver and grant its request for expedited consideration. You may contact Matthew Forsys at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Forsys's attention at the following address:

Matthew Forys
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Certification

Pursuant to Agency regulations and as required by law, I certify, to the best of my knowledge, that the above facts are true and correct.

A handwritten signature in dark ink, appearing to read "Mark R. Levin", written over a horizontal line.

Mark R. Levin
President
Landmark Legal Foundation

Exhibit A



Insider Special -- July 17, 2012

Insider Special -- The Unfinished Agenda

EPA Positioned To Stay Under Radar Through 2012 Election Season

Posted: July 17, 2012

Editor's Note: You can read all the background stories and documents referenced in this special report by signing up for a free, one-month trial to InsideEPA.com (see box on this page).

EPA and its regulations have long-been a favorite target of critics but the agency is positioning itself to largely fly under the political radar through the elections.

The agency completed most of its controversial rules months ago, and is now killing some and delaying many others until November or later, while preparing to release relatively popular, non-controversial items such as its vehicle greenhouse gas (GHG) rule before the elections.

"I think we all understand that there are political windows that are better and others that are worse," says one environmentalist.

A former Bush administration official says EPA intentionally sought to establish deadlines for controversial measures that would fall after the election "no matter what." And it has put many discretionary items "on the slow track."

In an early indication of the administration's pre-election priorities, a top EPA transport official said recently that completion of the vehicle GHG rule, which is expected to cut gasoline consumption, is a "top priority," while a pending Tier III fuel and engine rule, which many critics said would raise gasoline prices, would be delayed.

The former Bush official says the Tier III standard -- which had drawn charges that EPA was seeking to further raise gasoline prices when they briefly spiraled upward this spring -- "was an easy one to delay," especially because the agency can synchronize it with its vehicle GHG rules that are years away from taking effect.

Most recently, EPA officials July 13 announced they had dropped a controversial rulemaking that would have required livestock operators to report a host of data to the agency under the Clean Water Act -- an issue that was riling many producers in Iowa, a key election battleground, and other important farm states. And EPA July 16 said it had renegotiated a legal deadline for a controversial stormwater control measure, from 2012 until 2014.

As a result of such efforts, EPA faces no legal mandates to issue major rules between now and the elections, with several deadlines pegged for December, such as for a pending final fine particulate matter air quality standard and a final Portland cement rule package.

The agency is also expected not to finalize until after the election its proposal setting a first-time greenhouse gas (GHG) new source performance standard (NSPS) for new power plants despite winning a sweeping June 26 ruling from the U.S. Court of Appeals for the District of Columbia Circuit broadly backing its GHG regulatory program. EPA maintains it has "no plans" to issue GHG standards for existing sources but could do so late this year, several sources say.

Also likely delayed until after the election: a proposed guidance for permitting hydraulic fracturing operations that use diesel fuel, final cooling water standards for power plants, "uniform" air toxics standards for chemical and other industrial plants, guidance for determining when isolated wetlands and other marginal waters are subject to regulation under the water law, the "Tier III" fuel and engine standards, and a long-delayed rule setting standards for disposal of coal ash.

<http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/insider-special-July-...> 8/17/2012

One industry source notes that the administration was able to delay the fracking permitting guidance and the "uniform" air toxics standards by extending the comment deadline -- a clear indication that the measures will not go final anytime soon. "The administration is not interested in any new rules that they don't have to do between now and the election," the source says.

Additionally, because EPA's final NSPS for the oil and gas sector has not yet been published in the *Federal Register* months after it was signed, any challenges to that rule will be delayed.

Political Messaging

But the administration is seeking to issue regulations before the Nov. 8 elections that may bolster its messaging. Key among them is the GHG vehicle rules for model years (MY) 2017-2025, which EPA delivered to the White House for review July 16, in time for its release in the midst of election season.

The rule, which has widespread support including from most automakers, will likely allow the administration to make a host of key arguments, including highlighting its efforts to curtail GHG emissions, improving fuel efficiency and demonstrating the potential economic benefits of environmental regulations -- the latter of which would likely play well in Michigan, Ohio and other auto manufacturing states that are also key swing states.

Similarly, the administration is likely to issue its revised package of air and waste rules regulating incinerators and boilers that will weaken an earlier final rule to address industry criticism.

While they were not able to win broader industry support, the Obama re-election campaign is nevertheless highlighting EPA's controversial power plant air toxics rule, alongside the vehicle GHG rules. "The new [power plant] rules will help to clear our skies of pollutants that can make health problems like asthma and bronchitis worse, saving up to 17,000 lives per year," the campaign website says.

The former Bush official says that "if something is not done now, it's pretty well going to slide" until after the election, adding that "absolutely the last point in time" a rule would be signed is mid-September to avoid chances of a new administration immediately overturning it. "The most conservative thinking says don't even bother because if the administration flips [the new administration] will go back and take a look at what you did anyway. Or if it doesn't flip then you can put it out at the end of the year."

The source adds that EPA is also "in a pretty good place" with its Cross State Air Pollution Rule (CSAPR), which has been challenged in the D.C. Circuit and where a ruling is expected imminently. "If the court comes out tomorrow morning and [remands or vacates it], there is probably a space where they say they are evaluating the court opinion" and do not take any new action for months. If EPA wins, then it is another legal victory for the agency.

EPA air chief Gina McCarthy said at a July 10 forum that the agency would push back compliance deadlines if the agency prevails in the challenge, saying the agency would be "very sensitive" to state and utility needs for more time.

A second industry source notes that the Obama administration started with a number of controversial items "dumped in its lap early on, some of which it took on willingly and some the product of deadline litigation, particularly in the case of the Clean Air Act. . . . They coupled must-dos with want-to-dos to make for a very busy first term, particularly the first three years. What's happened now in 2012 is a combination of presidential election reticence as well as some of these obligations drying up. . . . It is a slightly odd confluence of events."

The environmentalist agrees that not much is going to move before the election but vows to continue to press the agency to act on important measures.

While EPA is "certainly not shut down for the rest of the term," the source says, "it's very likely that none of this stuff gets done before the election." Still, the source says it is possible some stalled items could move. "The obvious question for them is do they think it is either something no one is really going to pay attention to or something industry wants done, which could be the case with the boiler air toxics standards because it weakens them."

House Hits

Despite the agency's attempts to slow down rulemakings, sources across the political spectrum expect House Republicans to continue placing EPA in their crosshairs.

Lawmakers continue an almost daily messaging of press releases, hearings, letters and other actions highlighting agency measures and their effects. The GOP leadership has named the week of July 23 "Red Tape Week," where they intend to highlight the effects of EPA and other agency regulations and vote on a series of measures to strengthen the regulatory review process.

<http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/insider-special-July-...> 8/17/2012

Similarly, Rep. Ed Whitfield (R-KY) has slated a series of forums on amendments to the Clean Air Act starting with a focus on the law's state implementation plan provisions late this month.

The environmentalist expects "pretty much more of the same" from the House "including overreach on everything" that will mostly be "political and for show."

A Democratic strategist notes those efforts will "not go anywhere in the Senate. The House is going to try and force the construction of the Keystone XL pipeline . . . but that is also not going to happen. Between now and the election there will be much heat but little light shed on energy issues."

The former Bush official says the transportation bill enacted into law this summer was "the last" legislative vehicle for environmental policy riders that could have moved before the election, but EPA critics fared poorly there -- failing to attach a controversial measure blocking EPA's pending coal ash rules. "I don't know of anything that was more likely to get through than [the coal ash measure] and it didn't, and it's hard to imagine anything else significant," says the first industry source.

The source notes that lawmakers are not even planning to move any appropriations measures before November.

Efforts likely to go nowhere include GOP bids to revoke EPA's GHG authority, nascent lame-duck efforts to impose a carbon tax and efforts to pass tax extenders for a range of energy credits such as biofuels and renewables, though several sources are holding out hope that the energy credits could be included in end-of-year "fiscal cliff" efforts.

A second environmentalist adds that long-sought reforms to the Toxic Substances Control Act (TSCA) still appear doomed despite a recent victory from longtime TSCA reform supporter Sen. Frank Lautenberg (D-NJ) in attracting GOP support.

EPA And The Election

Sources agree that EPA will not have a top-tier role in the presidential election between Obama and GOP challenger Mitt Romney, though the Democratic strategist expects Democrats to hint at agency stances when they talk about "protecting public health and protecting clean energy jobs of the future." The source adds Obama will continue to talk about his pro-environmental record of saving lives, spurring innovation and creating jobs.

The second environmentalist says activists are disappointed that Obama is not running more on his environmental record and "excoriating" Romney for his flip-flopping on climate change. Because of Romney's change in position, he is also not expected to bring the issue up much. "Obama has made a fundamental mistake on these issues and has tried not to popularize them, which he could have done," the source says.

But sources say that regardless of the election's outcome, there is likely to be a flurry of rules and other policies being issued after Nov. 8 -- including measures that are subject to legal deadlines, or, in the event President Obama loses his re-election bid, to leave traps for the administration of GOP challenger Mitt Romney.

"If there is no second term, I would expect EPA to finalize a bunch of rules that are not final," the first environmentalist says, adding EPA will also propose discretionary rules as well for the Romney administration to finalize or kill.

The second industry source also expects a flurry of November and December activity from EPA if Obama loses, with the hope of some of them becoming permanent, while a more tempered pace if he wins.

But a third industry source would expect a lame-duck EPA to "not try to put things through if [Obama] loses because they can be undone." -- *Dawn Reeves*

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Exhibit B



2 of 65 DOCUMENTS

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Bozeman Daily Chronicle

July 31, 2012 Tuesday

SECTION: NATION; Pg. A.4

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HEADLINE: As the election nears, new regs facing delays

BODY:

WASHINGTON (AP) -- When the Obama administration agreed to set the first-ever federal limits on runoff in Florida, environmental groups were pleased. They thought the state's waters would finally get a break from a nutrient overdose that spawns algae, suffocates rivers, lakes and streams and forms byproducts in drinking water that could make people sick.

Nearly three years later -- with a presidential election looming and Florida expected to play a critical role in the outcome -- those groups are still waiting. The rules, originally scheduled to take effect in March, now won't be active until next January, and even then could be replaced altogether by state-drafted regulations.

In fact, a growing number of regulations are being delayed at federal agencies or at the White House. The list includes a rule cracking down on junk food at school bake sales, another banning children from dangerous work on farms and one setting federal standards for disposing toxic ash from coal-fired power plants.

Together, the delays suggest caution by the administration at a time when President Barack Obama is increasingly under attack by Republicans and business groups for pushing regulations that they say will kill jobs or needlessly extend federal power.

"Issuing more regulations now would not help dispel the perception that President Obama's administration is 'anti-business,'" said John D. Graham, who from 2001 to 2006 headed the Office of Information and Regulatory Affairs, the White House's political gatekeeper for new rules. And with unemployment at 8 percent, "the Obama administration knows that more costly burdens on business will not create jobs. Those rules will have to wait until after the election."

As the election nears, new regs facing delays Bozeman Daily Chronicle July 31, 2012 Tuesday

It's not uncommon for rulemaking to slow during election years "because the White House does not want to create any controversy," Graham, now dean of Indiana University's School of Public and Environmental Affairs, wrote in an email to The Associated Press.

Just last week, the EPA announced it would wait until 2013 to issue a regulation aimed at reducing the number of juvenile fish and shellfish that die in power plants' cooling water intakes and would also tweak a rule requiring new power plants to control mercury and other toxic air pollution. Republicans and industry had charged that both rules would help "kill" coal as an electricity source by helping to shut down older plants and preventing new ones from being built.

LOAD-DATE: August 1, 2012

Exhibit C

★ OBAMA'S LAST STAND ★

The latest eBook by
POLITICO's GLENN

POLITICO

EPA wears the bull's-eye

By: Jonathan Allen and Erica Martinson
June 20, 2012 09:21 AM EDT

This election year the EPA is toxic.

The Senate is voting on whether EPA planes can take pictures of farms — after it was mistakenly reported that drones were flying over the heartland. House Republicans want to cut the agency's funding to pre-1998 levels. And the president has threatened to veto a House bill, due up Wednesday, that would restrict Clean Air Act rules.

(Also on POLITICO: Energy issues crop up with farm bill)

Oh, and there were at least 10 — count 'em 10 — Capitol Hill hearings and markups on environmental matters Tuesday.

Forget drones, EPA could use a missile shield.

This week is just the latest round of a Republican attack that has forced the White House to hold back on new environmental regulations, lawmakers say — at least for now.

"They have slowed down some of that stuff, but it's only until after the election," Rep. Mike Simpson (R-Idaho) said. "After that, it's going to be scary."

Even some Democrats say the White House has responded to political reality in slowing down environmental regulations.

"The unrelenting attacks by the Republicans on environmental protection, I think, have caused people in the administration to be careful to pick their fights," said California Rep. Henry Waxman, the top Democrat on the House Energy and Commerce Committee.

To Republicans, the agency is the very embodiment of what they see as the worst of President Barack Obama and, as they see it, his liberal policies: big government reaching into the minutia of businesses.

And the drone rumor follows a list of other strange accusations plaguing the agency this year, like talk that it would start regulating farm dust (which it had no plans to do) and spilled milk (a trumped up version of reality).

"They are just an intimidating, overreaching, regulatory body," Rep. Nick Rahall (D-W.Va.) said of EPA. Rahall's state recently held a symposium on EPA's "War on Coal," a response to regulations now in effect and in the pipeline that could damage the coal industry.

Mitt Romney has hammered Obama over EPA policies during campaign stops in coal

country. For his part, Obama has warned that a Romney administration would roll back existing regulations to the detriment of public health, and his campaign has pointed to instances of Romney reversing past support for environmental regulations.

"It's not that people don't care in Missouri about the environment and it's not that they don't want some basic rules to make sure we have clean air and water," Sen. Claire McCaskill (D-Mo.) told POLITICO. "It's they don't want the overreach. And I think that's been a political talking point on the other side that has taken root particularly in the rural part of the state."

There are currently 25 EPA-generated rules held up in the review stage of the White House's Office of Information and Regulatory Affairs, more than any other Cabinet department or agency, according to the Office of Management and Budget. HHS, charged with implementing the president's health care law, has just 17 in that pipeline.

The full list of EPA rules in various stages of regulatory purgatory is much longer. They include mandates on coal ash, gasoline sulfur standards, Clean Water Act jurisdiction and industrial boilers. Gina McCarthy, the EPA's air chief, said Tuesday she doesn't know when the new boiler rule will be finalized.

"Still working on it," she told POLITICO. "Still working on it."

Last week, EPA sent a letter saying it isn't prepared to regulate greenhouse gas emissions from planes, and that it won't do so for engines on ships and other off-road vehicles and machines.

Some environmental groups say the agency should fight harder.

"The best defense against political attacks on the Clean Air Act is ambitious implementation of all its successful clean air programs, because they save lives and protect the climate. But when the EPA drags its heels on clean air implementation, big polluters and their lobbyists just sense weakness and redouble their attacks," said Kassie Siegel, the director of the Climate Law Institute at the Center for Biological Diversity.

But the stalled regulations don't tell the whole story. The Obama administration has finalized several significant environmental regulations — most under court orders — that have provided fodder for congressional cannons. They include greenhouse gas limits for new power plants, the mercury and air toxics rule at existing power plants, requirements to cut methane emissions at hydraulically fractured natural gas drilling sites, and a heavy hand overseeing mountaintop mining.

Sen. Lamar Alexander (R-Tenn.) is one of the few Republicans to embrace environmental regulations. He is a fan of a rule requiring costly power plant upgrades that would stop mercury and other toxins from getting into the air, and one that tries to protect downwind states from other states' pollution.

"That's what should have been done years ago. These pollutants were identified in the law in 1990, and 20 years later we're just getting around to doing what the courts have ordered EPA to do," Alexander said.

But for most Republicans and some Democrats the politics are clear: It's best to kick the EPA when it's down. Some are trying to block regulations that the administration is no longer pursuing.

McCaskill and Sen. Mike Johanns (R-Neb.) offered an amendment to the farm bill that would have stopped the EPA from implementing a farm dust rule that had been abandoned. (That amendment didn't make it onto the final list of 73 amendments being debated on the floor this week.) And McCaskill is proud of her efforts to block a child labor regulation from the Labor Department.

"I want to make sure no one forgets I had a part in killing both of them," she said.

For many environmental protection advocates, the battle is a partisan one. The Republicans who defended the EPA in the 1980s and 1990s are now gone. Waxman and Rep. Ed Markey (D-Mass.) published a report on Monday listing 247 votes the Republican-led House has taken since January of 2011 that they say would hurt environmental or public health policy.

And some on the left note that the House Republicans haven't really won many battles.

"The toxic cloud of anti-EPA rhetoric from congressional Republicans has had limited effect because the Senate and the president have kept most of their nasty little bills to gut our health and environmental protections from becoming law," David D. Doniger of the Natural Resources Defense Council said. "All this anti-EPA venom appeals to their base, but it is out of step with the majority of the American people, who consistently say they want EPA to do its job and they want Congress to keep its hands off the laws that protect our health and our environment."

But Republicans made clear late Tuesday that they have no intention of giving even an inch to the EPA. House Energy and Commerce Chairman Fred Upton (R-Mich.) and several members of his committee sent a letter to EPA and the White House suggesting that the federal government is overreaching in its research and regulation of hydraulic fracturing, also known as "fracking."

Sen. Jim Inhofe (R-Okla.), who is forcing a Wednesday vote on repealing the EPA's rule limiting mercury and other air pollutants from power plants, sent a letter to the agency's inspector general asking for an investigation into a controversial natural-gas enforcement case in Texas.

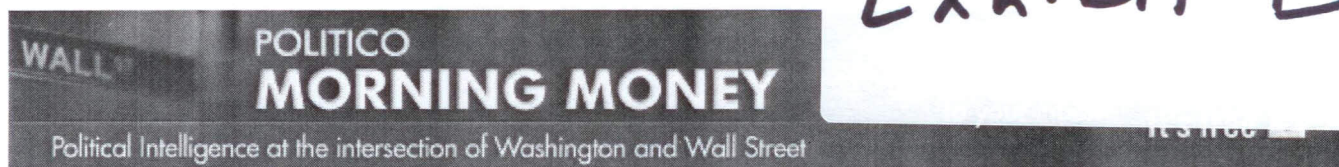
And the White House is fighting back against congressional Republicans. OMB issued a veto threat Tuesday against a House energy bill that it says would block implementation of rules associated with the Clean Air Act.

Darren Goode contributed to this story.

This article first appeared on POLITICO Pro at 9:23 p.m. on June 19, 2012.

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Exhibit D



POLITICO

President Obama's administration slow-walks new rules

By: Darren Samuelsohn and Jonathan Allen
July 12, 2012 04:35 AM EDT

It's a staple of Mitt Romney's talking points: President Barack Obama and his lefty lieutenants have stifled economic growth with a Politburo-style regulatory regime.

After all, the president dropped two of the biggest regulatory bombs in memory with the Dodd-Frank Wall Street Reform and a health care law that gives the Health and Human Services Department sweeping authority to run a whole new insurance system.

But now Obama's making it tougher to put costly new rules in place. His enforcer: Cass Sunstein, an old buddy from their University of Chicago days whose friendship with the president gives him more clout in the West Wing than many advisers of higher rank. Sunstein has imposed what is essentially a soft freeze on new regulations.

Even though that's not official policy, the administration has been increasingly frugal in issuing regulations, according to a POLITICO review of government data and more than two dozen interviews with current and former administration officials, lawmakers in both parties, business leaders and liberal activists. The analysis of the federal rule-making database shows Obama as of Tuesday had issued 1,004 final regulations since arriving in office. That's fewer than his two immediate predecessors, George W. Bush and Bill Clinton. This year, Obama is also on pace to put out the fewest "economically significant" regulations of any year in his presidency.

In classic Washington fashion, the administration's slowdown of new rules is making liberals mad and winning Obama no credit from Republicans or the business community — especially not in an election year in which the over-regulator meme is so prevalent.

Some say he truly believes in regulatory restraint during tough economic times. Others see a crass political calculation at play: Don't give Romney any more ammunition before the election — and then open the floodgates after the polls close.

Either way, the result is the same.

Most agencies aren't even on the scoreboard with big-ticket rules this year: The Environmental Protection Agency: two major regulations, clamping down on emissions from petroleum refineries, and on oil-and-gas drilling operations. The Department of Justice: One, on prison rape. Treasury: One, on Dodd-Frank.

Republicans "just assert stuff and the facts have never encumbered them. I think there's a sense that Democrats are regulation-bound or regulation-minded and so the assertion sticks. I don't think it's any more complicated than that," said Harold Ickes, who served as deputy chief of staff to Clinton and then counted delegates for Hillary Clinton when she ran against Obama.

Romney has linked the administration's rule-making to his larger narrative about Obama's job-killing agenda.

In Michigan last month, the Republican led a call-and-response asking a crowd if it wanted "four more years of Obamacare," "four more years of Dodd-Frank" and "four more years of energy policies that say we can't use our oil and our coal and our gas."

And here's what he said in March in Illinois: "Day by day, job-killing regulation by job-killing regulation, bureaucrat by bureaucrat, this president is crushing the dream and the dreamers, and I will make sure that finally ends."

GOP-aligned groups are reinforcing the message.

American Crossroads is running an ad quoting Cecil Roberts, president of the United Mine Workers of America, discussing concerns about rules to limit coal pollution. "Our health care, pensions and way of life are on the line," a narrator warns. "Say no to the Obama administration's extreme EPA rules."

Clearly sensitive to the attacks, Obama has defended himself on the trail.

"I don't believe every regulation is smart, or every tax dollar can be spent wisely," Obama said at a campaign rally last month in Durham, N.H.

Facts can be tricky things, as evidenced by a House Energy and Commerce Committee news release issued last month June when EPA bowed to industry demands to soften a proposal regulating cement kilns — to the consternation of environmentalists.

In the same sentence, Rep. John Sullivan (R-Okla.) called the industry-friendly rule a "welcome development" while still denouncing the "EPA's radical regulatory agenda."

Experts on federal regulations say that rule-making often slows down in an election year but that it's particularly acute now because Republicans have focused so much attention on that element of the president's work.

"They're just incredibly afraid of the job-killing label," OMB Watch President Katherine McFate said.

Agency officials say the White House is so obsessed with depriving Republicans of fresh ammunition that Sunstein has moved beyond the traditional role of reviewing regulations to dip into minor matters that don't rise to his level as head of the Office of Information and Regulatory Affairs, such as guidance from the agencies to the states.

"They are asserting their review authority over lesser and lesser things," an EPA official said.

Regulations are a methodical and essential part of any administration's governing once the legislative sausage-making is complete. Agencies must follow strict administrative requirements to propose rules, accept public comment and then finalize their plans — all with the Office of Management and Budget keeping close tabs on the process.

Obama's regulatory policies have caused heartburn for agency officials and advocates who see months and years of work blocked by the White House internal review process.

Ideas stuck on the drawing board include an EPA plan to reduce mercury waste from dentist offices, an Occupational Safety and Health Administration update to protect workers from exposure to crystalline silica dust and Energy Department efficiency standards for walk-in freezers.

Sunstein said the number of economically significant regulations that come out in any given month or year depends on several factors — but not politics.

“The president has made clear his priority is getting out of a tough economic situation,” Sunstein told POLITICO. “From the time I got here, my priority was to make sure our regulatory framework fit with economic priorities. If you have expensive rules, you want to make sure they are amply justified.”

So far, the number of Obama’s regulations trails those of his predecessors. After the midterms, Bill Daley entered the White House as chief of staff. He courted the U.S. Chamber of Commerce and promised to make the administration more business-friendly.

While the overall number of final Obama rules was slightly higher the year after the 2010 mid-terms, the number of economically significant rules — which have either a \$100 million price tag or \$100 million in public health benefits — dropped from 70 in 2010 to 55 last year, according to a search of the economically significant rules listed in the OMB database. This year, nearly a third of the big-ticket rules — eight of 25 — have been related to implementing the health care law.

The length of time regulations sat at OMB for review also has increased by more than three weeks since the 2010 elections, from an average of 45 days before to 67 days after.

And here’s how Obama’s 1,004 rules completed as of Tuesday compares overall with his predecessors: George W. Bush had completed 1,073 rules at the same point in office, Clinton 1,775, according to the OMB database. In September 1993, Clinton issued an executive order that narrowed the definition of a economically significant rule and the number of rules reviewed by the White House.

“Just the fact is we haven’t had as many as our predecessor,” Sunstein said. “That’s suggestive that there’s been some discipline.”

Sunstein, once a target of conservative commentator Glenn Beck, has now become a lightning rod for agency officials and liberal activists. His office, which is part of the White House OMB, can make or break new regulations — and, more frustrating to some folks in the administration, tweak them just enough at the last minute to tip the balance more toward industry.

A hard-nosed number-cruncher known for halting regulations if he determines they would burden business more than they would benefit the public, Sunstein has the added gravitas of coming into his job in September 2009 as a friend of Obama’s.

“I can talk to him if I need to,” Sunstein said. “But he has a lot of things to do, so I want to work under his guidance without diverting him from other things like wars and averting a depression.”

Sunstein’s “strength in the administration appears to be increasing over time,” said John Graham, George W. Bush’s first regulatory chief and now dean of the Indiana University School of Public and Environmental Affairs. Graham noted that Sunstein has pushed

through a pair of regulatory reform initiatives that eliminate red tape at agencies and kill redundant rules, an effort that should help Obama improve his image with industry.

"The more visible OIRA becomes in regulatory reform, the more it will relieve the widespread concern that President Obama is anti-business," Graham said.

A former Obama administration official told POLITICO that Sunstein's influence also has grown since OMB Directors Peter Orszag and Jack Lew moved on, elevating Jeff Zients to the role of acting chief.

"Cass is in the enviable position of being very close to the president, and he is therefore able not only to read him well but also to reflect him well," said Sally Katzen, former Clinton regulatory chief and now senior adviser at the Podesta Group.

In the interview, Sunstein touted a range of rules that he said have gotten the government solid bang for its buck: roughly \$91 billion in net public health benefits and consumer savings through the first three fiscal years of Obama's term. He cited new fuel economy regulations that will reduce the number of trips Americans need to make to the gas station and a salmonella rule that's preventing up to 79,000 illnesses a year. There have also been other efforts, including replacing the food pyramid with a graphic that displays food categories on a plate.

"If you've got a rule that prevents a serious harm to people who can't in some cases really protect themselves, that's good," Sunstein said.

Obama-era regulation implementation costs also have peaked at just more than \$9 billion in a single year. "We didn't hit the [George W.] Bush high" of \$10 billion, nor the highs during the prior three administrations — Clinton, George H.W. Bush and Ronald Reagan — which were all well over \$10 billion, Sunstein said.

Speaking Friday in Pittsburgh, Obama went on offense on regulations, saying Romney plans to eliminate rules "that we just put in place to make sure that Wall Street doesn't act recklessly and we can prevent another taxpayer-funded bailout when the financial system goes out of whack; regulations that protect our air or our water; regulations that protect consumers from being taken advantage of."

Democratic lawmakers defend Obama's regulatory record.

"From the beginning, they've been trying to balance the equities there," said Rep. Chris Van Hollen (D-Md.). "My sense is that they work very hard to be reasonable both in protecting the public health and protecting consumers but doing it in the most cost-effective way."

While Republicans are not holding back in their criticism, most industry groups are far more restrained. Some acknowledge the numbers show a less aggressive government than the political rhetoric suggests. Others don't want to upset Obama for fear he'll unleash many more rules if he wins a second term.

"It's probably accurate to say the regulations, the economically significant regulations, have been fewer," said Bill Kovacs, a senior vice president of the U.S. Chamber of Commerce, who noted the Obama EPA hasn't exercised its full authority under the Clean Air Act in regulating power plants. So far, EPA has proposed rules only for new facilities and postponed until after the election a much more costly set of requirements on the

nation's aging electric utilities.

"The president has said, 'Hey, we've got to slow this down,'" said Rep. Lee Terry (R-Neb.). "We can't have more layoffs in October and November."

Rep. Mike Simpson, the Idaho Republican who is in charge of EPA's annual spending bill, predicted an Obama defeat would unleash a torrent of midnight regulations from Obama before Romney is sworn in.

And "if he is reelected," Simpson added, "it's hellbent for leather."

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

August 29, 2012

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Matthew Forys
Landmark Legal Foundation
19415 Deerfield Avenue
Suite 312
Leesburg, VA 20176

RE: Request Number HQ-FOI-01861-12

Dear Mr. Forys:

This is in response to your request for a fee waiver and expedited processing in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records regarding any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012.

We have reviewed your fee waiver justification and based on the information provided, we are granting your request for a fee waiver. However, this fee waiver does not include a waiver of fees for otherwise publically available records.

We have reviewed your expedited processing justification and based on the information provided, we are denying your request for expedited processing. You have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The EPA will respond to your information request as expeditiously as possible.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

Internet Address (URL) • <http://www.epa.gov>

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Mr. Matthew C. Forys
August 29, 2012
Page 2

Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry F. Gottesman", written over the word "Sincerely,".

Larry F. Gottesman
National FOIA Officer



September 14, 2012

Via Express Mail

National Freedom of Information Officer
U.S. Environmental Protection Agency
1301 Constitution Ave., NW
Room 6416J
Washington, DC 20004
hq.foia@epa.gov

Re: **Freedom of Information Act Appeal**
Request Number HQ-FOI-01861-12
(Proposed Rules, Summer/Fall 2012)

To Whom It May Concern:

This is an appeal of the Environmental Protection Agency's ("EPA") erroneous denial of Landmark Legal Foundation's ("Landmark") request for expedited processing of its August 17, 2012 Freedom of Information Act Request. By Mr. Larry F. Gottsman's letter dated August 29, 2012, the EPA granted Landmark's request for a fee waiver but denied expedited processing. Specifically, the letter stated, "You have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."

Left unaddressed was Landmark's demonstration of compelling need for the documents requested because Landmark is an entity "primarily engaged in disseminating information" and has an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v); 40 CFR 2.104(e)(1)(ii). Mr. Gottsman's dismissive conclusion that Landmark has not demonstrated a "life or death" justification for expedited processing utterly disregards EPA's statutory duty for a fulsome consideration of FOIA requests. This is particularly troublesome given EPA's history of failing to comply both with the Act and with court orders in Landmark's previous FOIA litigation EPA. See Landmark Legal Foundation v. EPA, 272 F.Supp. 2d 70, 73 (D.D.C. 2003) (Agency's failure to comply with a U.S. District Court preliminary injunction order resulted in order that "EPA will be held in contempt, and ordered to pay sanctions . . . as a result of EPA's contumacious conduct").

Headquarters: 3100 Broadway • Suite 1210 • Kansas City, Missouri 64111 • (816) 931-5559 • FAX (816) 931-1115
Virginia Office: 19415 Deerfield Avenue • Suite 312 • Leesburg, Virginia 20176 • (703) 554-6100 • FAX (703) 554-6119

I. Introduction

Landmark's original request, attached hereto as Exhibit A, requests public records related to published reports that the EPA is intentionally delaying the issuance of controversial new regulations until after the November elections. Landmark specifically seeks information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012.

As demonstrated below, Landmark met the statutory and regulatory requirements for expedited processing by demonstrating a compelling need, given the timeliness of this matter in light of the upcoming election as well as the seriousness of politicization of the EPA. Moreover, Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program.

II. Landmark's Request Should Receive Expedited Processing.

In order to receive expedited process under EPA regulations, a FOIA request must show a "compelling need" by either: (1) establishing that the failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; OR (2) if you are a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public that actual or alleged Federal Government activity. 40 CFR 2.104 (e)(i)-(ii) (2011) (emphasis added). See ACLU v. Department of Justice, 321 F.Supp. 2d 24, 27-28 (D.D.C. 2004).

A. There is a Compelling Need For Public Disclosure of the Requested Records.

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records relate directly to several matters of tremendous public interest and debate as shown by the attached exhibits, including the delay of the rulemaking process because of an upcoming election. Landmark attached a sample of the news reports covering the regulatory delay, which had been the subject of commentary by members of the United State Congress. This delay raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's leadership is intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. Each one of these issues is a matter for immediate and full disclosure.

There are many significant public interests implicated in the possibility that the EPA's activities have been politicized. The health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the EPA. Furthermore, these issues regarding EPA's regulatory activities (the EPA's fulfillment of its responsibilities to inform the public and submit to appropriate congressional oversight, and the possibility that the EPA has put partisan interests above the health and wellbeing of the general public) should be considered by the American public before voting in this year's presidential and congressional elections.

The request makes clear that the records requested are of critical importance to an ongoing national debate -- the extent to which the EPA has been politicized and whether EPA officials are putting the partisan interests of a particular candidate above the transparent conduct of official business. There is no question that release of the records requested would be in the public interest because they would contribute significantly to the public understanding of "actual or alleged" activities of the government. See 5 U.S.C. Section 552(a)(6)(E)(v)(II).

Moreover, EPA has a history of failing to comply with Landmark's FOIA requests seeking records similar to those sought in this request. This in and of itself presents a compelling public interest justifying expedited processing of this request.

In short, Landmark meets the factors established by statute and regulation for a compelling need.

B. Landmark is Primarily Engaged in Disseminating Information.

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. Courts have found that organizations with missions and information-dissemination activities similar to Landmark's are "primarily engaged in disseminating information." See, e.g., American Civil Liberties Union v. Dep't of Justice, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that one of the plaintiffs is a public interest group that "gathers information of potential interest into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information"). As demonstrated in its original request, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

In Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that the group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Moreover, Landmark's work is discussed on hundreds of radio stations throughout the country on a regular basis on both national and local talk shows. Numerous newspapers, news programs, blogs and other media outlets also discuss Landmark and its work regularly. As noted on Landmark's website, one of "Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." www.landmarklegal.org (last visited September 14, 2012). Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

In Leadership Conf. on Civil Rights, the Court found that requestor Leadership Conference, a "nonpartisan coalition of over 180 national organizations representing men and women of all ethnic backgrounds and races" met the information dissemination standard. The Court stated:

Plaintiff is primarily engaged in the dissemination of information regarding civil rights. Plaintiff's mission is to serve as the site of record for relevant and up-to-the minute civil rights news and information....Plaintiff disseminates information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice. Leadership Conf. on Civil Rights, 404 F. Supp. 2d 246, 260.

Similarly, Landmark Legal Foundation is primarily engaged in the dissemination of information. Much of this information is related to the federal government's violation of civil rights. Landmark has a long history of monitoring the activities of several federal agencies, including the EPA. Landmark established the first comprehensive database of EPA grants on its website. Landmark stays current on EPA activity, reviewing and commenting on EPA proposed regulations and assisting the challenges to EPA actions as *amicus curiae* in court. Landmark disseminates this information to its members and the readers of its newsletters and website. Landmark's ability to process EPA information and activities and convey it in an understandable manner to the public makes it highly sought after for its opinion and editorial content.

Upon receipt of the requested information in this matter, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information:

1. Landmark will post responsive information on its web site (www.landmarklegal.org), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;

2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;
3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;
4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;
5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such articles in the past;
6. Landmark will issue press releases to specific media outlets; and
7. Landmark staff will appear on television and radio programs.¹

Landmark has a proven record of ensuring that information it receives through FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the Associated Press, The Wall Street Journal, The Washington Post, The Washington Times, and Fox News Channel.

In short, Landmark meets the relevant definitions for a person primarily engaged in disseminating information and a compelling need.

III. Conclusion

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Agency conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark expects the EPA to fully comply with the legal mandates set forth in the FOIA.

Furthermore, please provide assurances that EPA officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request.

¹ See Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided "nine ways in which it communicates collected information to the public" sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

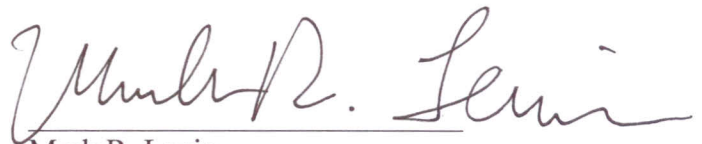
Additionally, be aware that any actions taken in contravention of the Agency's responsibilities will be raised if this request becomes the subject of litigation.

For the reasons stated above, Landmark asks that the EPA grant Landmark's appeal of the denial of its request for expedited processing. You may contact Matthew Fors at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Fors's attention at the following address:

Matthew Fors
Landmark Legal Foundation
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176

Certification

Pursuant to Agency regulations and as required by law, I certify, to the best of my knowledge, that the above facts are true and correct.

A handwritten signature in black ink, appearing to read "Mark R. Levin". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Mark R. Levin
President
Landmark Legal Foundation



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 18 2012

OFFICE OF
GENERAL COUNSEL

Mark Levin
Landmark Legal Foundation
19415 Deerfield Ave, Suite 312
Leesburg, VA 20176

Re: Freedom of Information Act Appeal HQ-APP-00186-12 (HQ-FOI-01861-12)

Dear Mr. Levin:

I am responding to your September 14, 2012 appeal of a denial of expedited processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 ("Appeal Letter"). You appealed the August 29, 2012 letter from Larry F. Gottesman, National FOIA Officer of the U.S. Environmental Protection Agency (the "EPA" or "Agency") to deny your request for expedited processing of your FOIA request numbered HQ-APP-01861-12 ("Denial Letter"). Your request for a fee waiver for this FOIA request was granted, and you are not appealing the decision regarding your request for a fee waiver at this time.

You seek expedited processing of your FOIA request for documents and records regarding communications about proposed rules and regulations that have not been finalized between January 1, 2012 and August 17, 2012, specifically, "information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012." Your request was subsequently modified by limiting the search to senior officials in EPA HQ. Your request was made on behalf of the Landmark Legal Foundation, which you describe as a "tax-exempt, public interest law firm." FOIA Request Letter from Landmark Legal Foundation, August 17, 2012 ("Request Letter") at 7.¹ Your request for expedited processing was denied because "[y]ou have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual." Denial Letter, August 29, 2012.

I have carefully considered your initial request for expedited processing, the EPA's initial denial of your request, and your appeal. For the purposes of this appeal, I am not addressing the

¹ For purposes of this appeal, "you" and "your" refers to communications between the EPA and any representative of Landmark Legal Foundation regarding this FOIA request.

Mr. Mark Levin, Landmark Legal Foundation
Freedom of Information Act Appeal HQ-APP-00152-12 (07-FOI-00404-12)
Page 2 of 4

question of whether your request, as written, reasonably describes the records that you are requesting in order to constitute a proper FOIA request. For the reasons set forth below, I have concluded that your appeal requesting expedited processing should be, and is denied.

Analysis

In your appeal letter, you state that your request qualifies for expedited processing under 40 C.F.R. § 2.104(e)(i)-(ii), which provides for the EPA to take requests out of order and provide expedited processing when the EPA determines that such requests or appeals involve a “compelling need,” as follows:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (ii) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.

In your appeal letter, you have not contended that the documents you request are required due to an imminent threat to the life or safety of an individual. Therefore, I will analyze your request for expedited processing under section (ii) of the EPA’s regulations only.

“Person Primarily Engaged in Disseminating Information to the Public”

To qualify for expedited processing under 40 C.F.R. §2.104(e)(ii), a requester must establish that they are a person primarily engaged in disseminating information to the public. As EPA’s regulations state at 40 C.F.R. §2.104(e)(ii)(3), in order to receive expedited processing under this provision, the requester must submit a statement certified to be true and correct to the best of your knowledge and belief, explaining in detail the basis for the request. *Id.* If you are not a full-time member of the news media, you must establish in that statement that you are a person whose primary professional activity or occupation is information dissemination, although it need not be your sole occupation. *Id.*

In your FOIA Request Letter, incorporated by reference in your Appeal, you state that your organization has a primary mission as a tax-exempt, public interest law firm, who investigates, litigates, and publicizes instances of improper and/or illegal government activity. Request Letter at 7. In your appeal, you noted that Landmark reviews and provides comments to EPA on proposed regulations and assist with challenges to EPA actions. You have not established that the Landmark Legal Foundation is primarily engaged in disseminating information to the public. You also claim that Landmark Legal Foundation “is discussed” by various third party media outlets and that Landmark has published articles in print media and

Mr. Mark Levin, Landmark Legal Foundation
Freedom of Information Act Appeal HQ-APP-00152-12 (07-FOI-00404-12)
Page 3 of 4

appeared on TV. However, you did not provide any evidence or examples. Research and advocacy that is covered by third party media, your group's public appearances, and information presentations do not demonstrate that Landmark Legal Foundation itself is primarily engaged in dissemination of information to the public.

For the reasons explained, I find that you have not established that you are a person primarily engaged in disseminating information to the public to meet the threshold requirement of 40 C.F.R. §2.104(e)(ii), and your appeal for expedited processing is denied on this basis.

Your request also does not meet the second element of the test for expedited processing because you have not demonstrated an urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. 40 C.F.R. § 2.104(e)(ii)(3). Your request is not focused on any specific EPA activity or rule. Instead, your request asks the EPA to provide you broadly identified records based on your stated belief that proposed rules are being delayed for political reasons. The few news articles that you attached as Exhibits to your request and appeal indicate slight evidence of media interest in the general topic of politics and rulemaking. However, these articles and opinion pieces do not demonstrate substantial interest, either on the part of the American public or the media, in any particular issue which would be addressed by information responsive to your broad request. *See Am. Civil Liberties Union v. Dep't of Justice*, 2005 WL 588354, *12-14 (N.D. Cal. March 11, 2005) (citing *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 311 (D.C.Cir. 2001)). You have therefore not demonstrated an urgency to inform the public.

Conclusion

This letter constitutes EPA's final determination on your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Mr. Mark Levin, Landmark Legal Foundation
Freedom of Information Act Appeal HQ-APP-00152-12 (07-FOI-00404-12)
Page 4 of 4

Please call Jennifer Hammitt at (202) 564-5097 if you have further questions regarding this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read 'K Miller', written in a cursive style.

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office,

Larry F. Gottesman, National FOIA Officer

CLERK-S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CO-932
Rev. 4/96

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

Civil Action No. _____
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 40.5(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk-s records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 405(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 405(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff, defendant or counsel must complete the following:

I. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(es) below.]

- ☐ (a) relates to common property
- ☐ (b) involves common issues of fact
- ☐ (c) grows out of the same event or transaction
- ☐ (d) involves the validity or infringement of the same patent
- ☐ (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case: ☒

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

4. CAPTION AND CASE NUMBER OF RELATED CASE(E-S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

LANDMARK LEGAL FOUNDATION v. ENVIRONMENTAL PROTECTION AGENCY C.A. No. 00-2338

10-22-2012

DATE

3820311
Signature of Plaintiff /Defendant (or counsel)